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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EDWARD GENE ROURKE, Defendant and Appellant.	B158248 (Los Angeles County Super. Ct. No. PA037045)

APPEAL from a judgment of the Superior Court of Los Angeles County, Meredith C. Taylor, Judge. Affirmed.

Law Offices of Dennis A. Fischer, Dennis A. Fischer and John M. Bishop for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael C. Keller and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Edward Rourke appeals from the judgment (order granting probation) entered following a jury trial in which he was convicted, as charged, of possession of cocaine (Health & Saf. Code, § 11350, subd. (a); count 1), resisting an executive officer by means

of force or violence (Pen. Code, § 69; count 2 [further section references are to the Pen. Code]), and threatening a public officer with injury for performing his duties (§ 71; count 3). He contends that the judgment should be reversed in its entirety because his motion pursuant to section 1538.5 was improperly denied. He further contends that the evidence did not support his convictions on counts 2 and 3 and that various instructional errors were committed with respect to those counts. We affirm.

MOTION TO SUPPRESS (counts 1–3)

Factual and Procedural Background

Defendant was arrested without a warrant. At the hearing on a motion brought by defendant pursuant to section 1538.5, California Highway Patrol Officer Eric Stevenson testified that at approximately 6:00 p.m. on March 23, 2001, he was in uniform driving a marked patrol car on Highway 14 when he saw what appeared to be a disabled pickup truck in the gore point of the northbound San Fernando Road off ramp.[1] Stevenson knew that "earlier [defendant] had been [about a quarter of a mile] south of [Stevenson's] location and he had been helped by a different officer, and he had moved forward." Stevenson stopped behind defendant's truck to conduct a "welfare check."

As Stevenson approached the truck, he observed an "open case of beer in the back of the truck." Specifically, "the seals on the case had been opened." Defendant was standing by the door on the passenger side of the truck. Stevenson asked defendant if he was all right. Defendant responded that his truck had broken down and that he did not know why. "Because of the open case of beer," Stevenson asked defendant if he had had anything to drink that day.

In response to Stevenson's question, defendant became very agitated, moving around and flailing his arms. He stated that he had not been "'f-ing drinking.'" Stevenson ordered defendant to stand still so that he could conduct a field sobriety test.

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[1] "Gore point" was described as the "triangle separation between the traffic lanes and the off-ramp."

Defendant replied that "he had stood still long enough and he wasn't going to stand in front of [Stevenson] any more." Stevenson stated that defendant would be placed under arrest if he did not cooperate. Defendant then turned around and walked toward the truck. Stevenson ordered defendant to stop, again threatening to arrest him. Defendant turned back toward Stevenson and said, "'Fuck you; I'll kick your ass.'" During this interchange defendant "was agitated and . . . was pointing his finger at [Stevenson] and threatening and challenging [Stevenson] to a fight." Stevenson attempted to use pepper spray on defendant's face, but defendant turned and Stevenson "pretty much missed the intended target." Defendant then attempted to get into his truck. Stevenson prevented defendant from doing so by pinning defendant against the door.

Stevenson further testified that while he was attempting to place defendant in a "control hold" at the door of the truck, Maribel Sumner, an off-duty Glendale police officer who was passing by, stopped and assisted him. Sumner removed Stevenson's handcuffs from his duty belt and placed them on defendant. Defendant continued to resist, attempting to kick Stevenson and Sumner as the handcuffs were being put on. The kicking continued once the handcuffs were on, and Stevenson and Sumner proceeded to "hogtie" defendant in a "hobble restraint." Once defendant was restrained, Sumner searched him. She recovered a small brown vial that contained a white powdery substance (later determined to be cocaine) from defendant's front pants pocket. Defendant stated that he had found the vial underneath his truck when he was working on it.

Sumner testified at the suppression motion hearing that defendant was noncompliant and extremely agitated, and that she detected the odor of alcohol emanating from him. (Stevenson testified that he had not detected such odor.)

Defendant's wife, Elaine Rourke, testified for the defense that the truck had stopped running because of an electrical problem. She and defendant had previously pulled over to the side of the road when the vehicle quit. When the truck restarted, they drove farther down the road until the truck quit again. While defendant worked on the truck, Mrs. Rourke stayed inside with their dog and four cats. Mrs. Rourke described

Stevenson's use of pepper spray as an unprovoked attack on her husband and stated that the beer case in the bed of the truck did not contain beer but rather contained potatoes and onions that were being taken to the couple's mountain cabin.

In denying defendant's motion, the trial court noted that Stevenson's observation of the beer case was "not enough certainly to be conclusive or to prove anything, but it's enough to give the officer the basis on which to ask concerning that, especially in light of the fact that the car is there and appears disabled there on the side of the freeway, which can be a danger to themselves or danger to others . . . . [¶] So the officer [asked] a question to the defendant that was reasonable under the circumstances; and the defendant's response to that unfortunately triggered the incident that then followed. [¶] I can understand the defendant had a really bad day, couldn't have been any worse and I understand his wife was in the same position, and that this was the last thing that they needed to have occur in their life on that day; but the officer from the court's perspective heard the testimony from him; and then later what occurred at a later point in time . . . appears to have been action that was necessitated in response to the behavior of the defendant, which was nonresponsive to the officer's commands, disobeying in every particular what the officer was seeking to get from him."

Discussion

As stated by our Supreme Court in *People v. Woods* (1999) 21 Cal.4th 668, 673–674, "As the finder of fact in a proceeding to suppress evidence [citation], the superior court is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable. [Citation.] Accordingly, in reviewing the instant suppression order, we consider the record in the light most favorable to defendants as respondents since 'all factual conflicts must be resolved in the manner most favorable to the [superior] court's disposition on the [suppression] motion.' [Citation.] But while we defer to the superior court's express and implied factual findings if they are supported by substantial evidence, we exercise our independent judgment in determining the legality of a search on the facts so found. [Citations.]"

Defendant contends that the search of his pants pocket must be deemed illegal because Stevenson's "welfare check" of the truck and its occupants was a consensual encounter, during which defendant expressed his "basic right under the Fourth Amendment not to answer the officer's questions or cooperate with him." He further contends that statements he made to Stevenson which formed the basis of his convictions on counts 2 and 3 (§§ 69, 71) should also have been suppressed as the fruit of an illegal detention. We conclude that the Fourth Amendment right on which defendant relies was not violated under the instant circumstances.

Defendant's failure to answer questions or to cooperate did not occur in a vacuum. Although the record of the suppression motion hearing does not indicate who was driving the truck when it broke down, it is apparent that either defendant or Mrs. Rourke would have driven the truck away if it could have been fixed. And because of the "open case of beer" in the bed of the truck which was parked in a dangerous location, Stevenson was understandably concerned that beer might have been consumed by one of the people who would be driving the truck away.

Under these circumstances, it was reasonable for Stevenson to have asked defendant if he had been drinking. Defendant's failure to answer Stevenson's question or cooperate with him did not take the form of merely remaining silent or stating in a matter-of-fact manner that he would not answer. Rather, defendant's denial of drinking came laced with profanity and agitation, movement, and flailing of arms — conduct consistent with intoxication. At that point, Stevenson was justified in seeking to conduct a field sobriety test to verify or dispel the possibility that defendant was intoxicated. (See *People v. Gorrostieta* (1993) 19 Cal.App.4th 71, 82; *Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 762–763.)

The underlying cause of defendant's belligerence and use of profanity may have been unrelated to intoxication and based solely on defendant's frustration with his truck having twice broken down on the freeway. Nevertheless, in response to Stevenson's understandable request that defendant take a field sobriety test, defendant's continuing lack of cooperation culminated in a direct threat to "kick [Stevenson's] ass." Defendant's

conduct thus provided ample cause for Stevenson to apply physical restraint, leading to the discovery of cocaine in defendant's pocket. (See *People v. Souza* (1994) 9 Cal.4th 224, 242; *Marvin v. Department of Motor Vehicles* (1984) 161 Cal.App.3d 717, 719–720.) Accordingly, defendant's motion to suppress was properly denied.

TRIAL ISSUES (counts 2 and 3)

Factual and Procedural Background

The evidence at trial included essentially all of the facts adduced at the suppression motion. In addition, Stevenson explained when he first approached the truck, Mrs. Rourke was sitting in the passenger's seat and defendant was outside. Defendant told Stevenson that he had driven the truck to the gore point location. In addition to seeing the beer case in the back of the truck, Stevenson observed that defendant was a bit agitated. Stevenson stated that he asked defendant about drinking because of defendant's "general state. He appeared to be agitated, didn't want to get close to me, the fact there was a case of beer in the back. I wanted to make sure he hadn't been drinking and that he wasn't going to continue to drive." When Stevenson asked about the drinking, defendant "became irate" and "started using foul language."

As further testified by Stevenson: "I asked him to stand in front of me so I could conduct a DUI investigation, and he refused. [¶] . . . [¶] He turned around, started to walk towards his vehicle. I ordered him to stop, stand in front of me so I can conduct an investigation; and he said, 'I've stood in front of you long enough;' turned around and left." As defendant walked away, Stevenson "said if [defendant] didn't stop and comply with my instructions I was going to place him under arrest." Defendant "turned around, pointed his finger at me and said, 'Fuck you. I'll kick your ass.'" Stevenson was "afraid of the defendant at the time when he made that statement that he was going to kick [Stevenson's] ass."

Officer Sumner testified that as she removed Officer Stevenson's handcuffs from his belt and placed the cuffs on defendant, defendant stated, "'Fuck you.' 'Get away from me.' Things of that nature." Defendant was then taken to Stevenson's car and made to lean against the door so that a pat-down search could be conducted. Sumner felt

an object in defendant's pants pocket, reached inside, and removed a small glass vial. As she took the vial out, defendant spun around and started kicking. His arm or some other part of his body hit Sumner and caused the vial to fly out of her hand. During this time, Sumner detected the odor of alcohol on defendant's breath.

Sergeant Lawrence Wilson, who responded to Stevenson's call that force had been used on a suspect, testified that he spoke with defendant at the scene. In response to Wilson's questions, defendant "indicated that he was apologetic for giving the officer [(Stevenson)] a hard time; that he was having a very bad day. His truck wasn't working. He was having difficulty fixing it; and when he was contacted by the officer he took out his frustration on the officer." (This comment was overheard by Stevenson.) Wilson did not believe defendant to be under the influence of alcohol, but Mrs. Rourke told him that defendant had been using cocaine for several years.

Mrs. Rourke testified that she was driving the truck when it became disabled and was in the driver's seat when Stevenson pulled up. While she remained in the truck, she saw Stevenson point toward the back of the truck and defendant walk over to that area, which she could not see. Mrs. Rourke next saw defendant and Stevenson walk over to Stevenson's patrol car and stand there for a while. Afterward, defendant returned to the truck and stood near the front. Stevenson approached about 10 minutes later (on cross-examination, Mrs. Rourke changed the time estimate to less than one minute). Defendant said something to Stevenson and then "hopped up and down on one foot and touched his arms like that." "After a while of standing there [defendant] said, 'I must take care of my truck.'" There was smoke coming from the truck, and defendant tried to fix the problem area. As he did so, Stevenson walked up to defendant and used the pepper spray. Defendant was calm the entire time until the pepper spray was used and did not point at Stevenson or do anything else in a threatening manner. Mrs. Rourke further testified that defendant did not have anything to drink that day, that she had not told anyone that defendant was a user of cocaine, and that he had never used cocaine. She never heard defendant tell anyone at the scene that he had taken out his frustrations on Stevenson.

Testifying in his own behalf, defendant stated that he was just coming out from under the truck when Stevenson arrived. Stevenson made a motion for defendant to come to the rear of the truck and defendant complied. The two had a discussion, after which Stevenson went to his patrol car. Defendant resumed working on the truck. Stevenson returned about 20 minutes later, "complaining about he couldn't get out at that location on his radio." At that point there was an electrical fire under the hood. Mrs. Rourke was screaming and defendant "panicked." He tried to remove the battery, but while he was doing so defendant "said something to [Stevenson]" and Stevenson responded by "spray[ing] himself in the face with pepper spray." Stevenson continued to attempt to spray defendant as defendant backed away. Defendant would have run across the freeway to try to escape the pepper spray, but there were too many cars.

When the pepper spray ran out, Stevenson leaned against defendant on the side of the car until Sumner approached and put defendant's arm "like in a hammer lock." Defendant "spun around to get her off me, and she flew off on to the freeway" and "damn near got hit." As the handcuffs were being put on, defendant stated that Sumner "reached down and put her hand in my pants, right, and grabbed a hold of my private parts and just about ripped them off . . . ." Defendant then complied with Stevenson's demand that he lay down on the ground, but Sumner smashed defendant's head onto the cement. Stevenson and Sumner then applied the hobble restraint.

Defendant was asked if he "ever threatened Officer Stevenson," to which he answered, "Not at all." He was also asked if he "ever point[ed] [his] finger at [Stevenson] in a threatening manner," to which he answered, "Not that I know of. I don't believe I did at all."

A friend of defendant's testified that defendant had a reputation for truthfulness and did not use cocaine.

In rebuttal, Officer Sumner testified that she did not put her hand down defendant's pants or grab his genitals. Nor did she smash his head onto the ground.

The prosecutor argued to the jury that defendant was guilty as charged. Defendant argued that "he did nothing illegal in this case. [¶] He had the misfortune to have a bad

day and run into Officer Stevenson." Defendant urged that his detention was not lawful and Stevenson was therefore not properly engaged in the performance of his duties because there was no "unusual or suspicious circumstance or other demonstrable reason warranting the investigation." Defendant's argument also noted inconsistencies in the testimony of Officers Stevenson and Sumner, vis-à-vis each other and with respect to the time line reflected in the police report, and urged that the defense version of events was the more credible.

Discussion

A. Sufficiency of the Evidence

Defendant contends that the evidence is insufficient to support his convictions on counts 2 and 3 for violating sections 69 and 71, respectively.[2] In arguing this point, defendant asserts that his convictions on these counts cannot be sustained if Officer Stevenson was not lawfully engaged in the performance of his duties at the time of defendant's resistance and threats. Defendant then assumes that Stevenson was not so engaged because defendant's "detention and subsequent arrest were unlawful under the Fourth Amendment [and] the court erred in denying [his] section 1538.5 suppression motion . . . ." Thus, concludes defendant, the reasons why his suppression motion was improperly denied also undermine the basis of his convictions under sections 69 and 71, thereby invoking the bar of double jeopardy to any retrial.

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[2] Section 69 provides: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable [as an alternate felony/misdemeanor]."

Section 71 provides: "Every person who, with intent to cause, attempts to cause, or causes, any officer . . . to do, or refrain from doing, any act in the performance of his duties, by means of a threat, directly communicated to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out, is guilty of a public offense punishable as [an alternate felony/misdemeanor]."

We agree that a defendant cannot be convicted of an offense against a peace officer engaged in the performance of his duties unless the officer was acting lawfully at the time the offense was committed. (*In re Manuel G.* (1997) 16 Cal.4th 805, 815 [applying this rule to § 69].) But we have rejected defendant's argument that his detention and arrest were illegal. Accordingly, the instant argument must be rejected also.

B. Instruction on Duty to Submit

Continuing to focus on the rule that a person cannot commit a crime against a peace officer engaged in the performance of his duties if the officer has not acted lawfully, defendant turns his attention to CALJIC No. 9.26. The instruction, to which defendant did not object, states in pertinent part that "it is the duty of the person [being arrested] to refrain from using force or any weapon to resist the arrest or detention unless unreasonable or excessive force is being used to make the arrest or detention." Defendant contends that the instruction was erroneous because the jurors would reasonably understand it, by itself and in conjunction with the prosecutor's closing argument, to mean that a "'duty to submit' applied regardless of whether, as [defendant] clearly believed, the detention or arrest was not supported by sufficient cause and was therefore unlawful." Because of further instructions that were given to the jury, we disagree.

Although defendant is correct that the prosecutor argued to the jury that by virtue of defendant's conduct he refused to submit to Officer Stevenson, defendant is wrong in claiming that the argument stated that defendant could be convicted if Stevenson's conduct were unlawful. Significantly, in addition to CALJIC No. 9.26, defendant's jury was instructed that a peace officer is engaged in the performance of his duties "if he is making or attempting to make a lawful arrest" or "lawfully detaining or attempting to detain a person for questioning or investigation" (CALJIC No. 9.23); that a peace officer "may lawfully detain and question a person when the circumstances are such as would indicate to a reasonable peace officer in a like position that such a course of conduct is necessary to the proper discharge of his duties" (CALJIC No. 9.27); and that a peace

officer is not engaged in the performance of his duties "if he makes or attempts to make an unlawful arrest [or] detention" and that the defendant must be found not guilty if there is a reasonable doubt whether the officer was making or attempting to make a lawful arrest (CALJIC No. 16.110 (1997 rev.)).

We further note that defense counsel's closing argument properly stated that an officer attempting to make an unlawful arrest or detention is not engaged in the performance of his duties, and "[i]f you have a reasonable doubt that the peace officer was making or attempting to make a lawful arrest or detention . . . and thus have a reasonable doubt that the officer was engaged in the performance of his duties, you must find the defendant not guilty. [¶] I would suggest to you that that's exactly what happened in this case. This officer jumped the gun and things got out of control.

Finally, defendant misplaces reliance on *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 5, in which the jury of a defendant charged with resisting arrest was instructed that it was the defendant's duty to "'refrain from using force to resist such arrest, whether the arrest is either lawful or unlawful . . . .'" (Italics omitted.) As noted above, the instructions given in the case clearly posed Stevenson's *lawful* conduct as a prerequisite to conviction. Defendant's argument must therefore be rejected.

C. Failure to Instruct on Specific Intent

In a conference regarding jury instructions, the trial court stated its belief that sections 69 and 71 were general intent offenses and asked to hear counsels' position on the issue. Both agreed with the trial court, and the jury was thereafter instructed on general intent with respect to all three counts. Defendant contends that sections 69 and 71 are specific intent crimes, and that the failure to so instruct violated his substantial rights (§ 1259), thereby requiring that his convictions on the two counts be reversed.[3] We conclude that reversal is not required.

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[3] Section 69 can be violated in two different ways — preventing an officer from performing a duty or resisting an officer in the performance of his duty — which are

(footnote continued on next page)

Assuming for purposes of this opinion that sections 69 and 71 are specific intent crimes, the failure of the instructions to so specify was of no consequence. Defendant claims prejudice in that his "unfortunate 'Fuck you. I'll kick your ass' comment and resistance to the officer's commands to submit just as readily could have been found to reflect a misguided demand that he be left alone, rather than any intent to deter Stevenson from pursuing his duties." Defendant's argument might have some persuasive value if

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(footnote continued from previous page)
stated in the disjunctive. (See fn. 2, *ante*.) The jury instruction setting forth the elements of the offense was focused on the second way of violating the statute, as follows:

"Defendant is accused in Count 2 of having violated Section 69 of the Penal Code, a crime.

"Every person who willfully and unlawfully attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon that officer by law, or who knowingly resists, by the use of force or violence, an executive officer in the performance of his or her duty, is guilty of a violation of Section 69 of [the] Penal Code, a crime.

"The term 'executive officer' includes a [California] Highway patrol officer.

"In order to prove this crime, each of the following elements must be proved:

"1. A person knowingly and unlawfully resisted an executive officer in the performance of his or her duty; and

"2. The resistance was accomplished by means of force or violence."

With respect to section 71, the jury was instructed as follows:

"Defendant is accused in Count 3 of having violated Section 71 of the Penal Code, a crime.

"Every person who unlawfully and intentionally causes or attempts to cause an officer, an employee of a public or private educational institution, or any public officer or employee to do, or refrain from doing, an act in the performance of their duty, by means of threat directly communicated to the officer, public employee, or public officer is guilty of a violation of Section 71 of the Penal Code, a crime.

"The term officer includes a California Highway Patrol Officer.

"In order to prove this crime, each of the following elements must be proved:

"1. A person willfully and unlawfully attempted to deter or prevent an officer, public employee, or public officer from performing any duty imposed upon that officer, public employee, or public officer; and

"2. The attempt was accomplished by means of any threat or [*sic*] violence."

his so-called "unfortunate comment" were to be taken out of context. But the context in which it came included defendant's conduct in flailing his arms in an agitated manner, walking away when Stevenson demanded that he stand for a field sobriety test, then making the "unfortunate comment" in such a manner that it caused Stevenson to be fearful that defendant really would "kick [his] ass," and thereafter continuing to resist Stevenson and Sumner in both words and physical actions. And as the record makes clear, the focus of defendant's case was not that defendant's verbal threat and physical actions were not intended to cause Stevenson to refrain from discharging his duties. Rather, the defense — which the jury rejected — was that the threat was not made, the demands made upon defendant were unlawful, and Stevenson therefore was not acting in a lawful manner.

The conduct of defendant outlined above left no question of defendant's intent to resist Stevenson by the use of force or violence and to cause Stevenson to refrain from administering a field sobriety test by means of a threat to inflict injury. Accordingly, the failure to instruct on specific intent was clearly harmless. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1154.)

D. Section 148 as a Lesser Included Offense

Defendant contends that the trial court erred in failing to instruct, sua sponte, on resisting or obstructing a peace officer in violation of section 148, subdivision (a)(1),[4] as a lesser included offense of sections 69 and 71.[5] The Attorney General counters that

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[4] Section 148, subdivision (a)(1), provides misdemeanor punishment for "[e]very person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed . . . ."

[5] During the conference on instructions, the prosecutor suggested that instruction on section 148 be given to the jury. The trial court stated that section 148 was not a lesser included offense of sections 69 and 71, and that in any event instruction on section 148 would not be given unless requested by defendant. Defendant did not request such instruction.

section 148 is not a lesser included offense because it requires actual resistance while sections 69 and 71 are couched in terms that include an attempt to resist an officer in the performance of official duties. We need not resolve this issue.

"When there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of a lesser included offense, the court must instruct upon the lesser included offense, and must allow the jury to return the lesser conviction, even if not requested to do so. [Citations.]" (*People v. Webster* (1991) 54 Cal.3d 411, 443.) "An instruction on a lesser included offense must be given only when the evidence warrants such an instruction. [Citation.] To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, 'evidence from which a rational trier of fact could find beyond a reasonable doubt' that the defendant committed the lesser offense. [Citation.] Speculation is insufficient to require the giving of an instruction on a lesser included offense. [Citations.] In addition, a lesser included instruction need not be given when there is no evidence that the offense is less than that charged. [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 174.) Rather, it must be given "only when the evidence is substantial enough to merit consideration by the jury. [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 195, fn. 4.)

As we have noted in reaching our conclusion that any error in failing to instruct on specific intent was harmless, defendant's conduct left no question that he attempted to cause Stevenson to refrain from performing the officer's duties by means of a direct threat to inflict unlawful injury (§ 71) and resisted Stevenson by the use of force or violence in the performance of Stevenson's duty (§ 69). The defense was that the prosecution's version of events simply did not occur.

Assuming that defendant's conduct, as described by the prosecution, necessarily included the type of resistance embodied in section 148, "there is no evidence that the offense[s are] less than that charged." (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 174.) The evidence presented could not have absolved defendant of having violated sections 69 and 71 but still provided a basis to convict him of section 148's nonforceful, nonphysically threatening resistance, delay, or obstruction of an officer in the discharge

of his duties. Accordingly, the evidence of the lesser offense was not "substantial enough to merit consideration by the jury" (*People v. Barton*, *supra*, 12 Cal.4th at p. 195, fn. 4) and instruction on section 148 was not required because there was no "substantial evidence that an element of the charged offense [was] missing" (*People v. Webster*, *supra*, 54 Cal.3d at p. 443). For the same reason, it is not reasonably probable that defendant would have benefited from instruction on section 148 had it been given. (See *People v. Breverman* (1998) 19 Cal.4th 142, 178.)

E. Unanimity Instruction

Defendant contends that the trial court erred in failing to give a unanimity instruction, sua sponte, on count 2, which alleged violation of section 69. The basis of this contention is the assertion that the prosecution's evidence regarding defendant's conduct prior to Officer Sumner coming to Officer Stevenson's assistance constituted a separate unlawful act from his conduct after Sumner arrived. And as the prosecution did not make an election, an instruction requiring unanimous jury agreement on at least one of the acts was therefore required. We disagree.

The failure to give a unanimity instruction is error when "there is evidence based on which reasonable jurors could disagree as to which act the defendant committed. If there is such evidence, the failure to give [a unanimity instruction] will most often, though not necessarily, be prejudicial." (*People v. Schultz* (1987) 192 Cal.App.3d 535, 539–540, fn. omitted.) But "[t]he unanimity instruction is not required when the acts alleged are so closely connected as to form part of one transaction. [Citations.] The 'continuous conduct' rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. [Citation.]" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

The information alleged, and the prosecution proceeded on the basis, that Stevenson was the victim of defendant's violation of section 69. Defendant's acts in threatening Stevenson, resisting having handcuffs placed on him, and continuing to resist once Sumner intervened, including kicking at both officers when Sumner was conducting a search, were all part of the same course of conduct. (See *People v. Champion* (1995)

9 Cal.4th 879, 932; *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1295; *People v. Jefferson* (1954) 123 Cal.App.2d 219, 221.) To paraphrase *People v. Champion*, *supra*, 9 Cal.4th at page 932, "[b]ecause in this case any juror believing that defendant [resisted Stevenson by the use of force before Sumner came to Stevenson's assistance] would inexorably believe that he also [resisted Stevenson by the use of force after Sumner intervened], the trial court did not err in failing to give a unanimity instruction." (Fn. omitted.)

F. Instruction on Section 71

Section 71 is violated when a person attempts to deter an officer from doing an act "by means of a threat, directly communicated to such person, to inflict an unlawful injury. . . ." Unlike section 69, the words "force" and "violence" do not appear in the statute. Nevertheless, the jury instruction on the elements of section 71 stated that defendant's attempt to deter Stevenson must have been "accomplished by means of any threat *or* violence." (Italics added.) Contrary to defendant's contention, we perceive no prejudice in this apparent typographical error.

Had the instruction used the word "of" rather than "or" ("threat *of* violence"), it would have been proper. Defendant's threat to "kick [Stevenson's] ass" was one in which violence would be used "to inflict an unlawful injury," as required by the statute. With violence appearing as an alternative to threat, as the instruction was written, defendant could have theoretically been found guilty of violating section 71 by either a threat unaccompanied by violence or by violence unaccompanied by a threat. But there was no threat in this case that did not suggest violence ("kick[ing Stevenson's] ass"), and defendant's utterance of the threat was one of the cornerstones of the prosecution's case.

The effect of an error involving "misinstruction of a single element of a charged crime" is gauged by the standard set forth in *Chapman v. California* (1967) 386 U.S. 18. (See *People v. Avila* (1995) 35 Cal.App.4th 642, 662.) "The initial step in *Chapman* analysis for a reviewing court is as follows, 'First, it must ask what evidence the jury actually considered in reaching its verdict.' [Citation.] Then, a reviewing court 'must then weigh the probative force of that evidence as against the probative force of the

[erroneous instruction] standing alone.' [Citation.]" (*People v. Avila*, *supra*, 35 Cal.App.4th at pp. 662–663.)

Here, the jury unquestionably considered evidence of a threat that involved violence, and there was no evidence of a nonviolent threat or violence without a threat. Accordingly, the instructional error about which defendant complains was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

ORTEGA, J.